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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 1267

MACIO BERNARD SIMPSON,

Petitioner,

-VS-

STATE OF FLORIDA,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF CERTIORARI

LOUIS O. FROST, JR.
PUBLIC DEFENDER

GERALD SOHN
Assistant Public Defender

Counsel for Petitioner
Duval County Courthouse
Jacksonville, Florida 32202

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REPLY TO RESPONDENT'S REASONS
WHY THE WRIT SHOULD NOT ISSUE

The Response to Petition for Writ of Certiorari does not address itself to the issues raised in the Petition or to the decision to which certiorari is sought. Instead, Respondent raises two points which at best are immaterial.

The first point is that the question of estoppel was not raised in the original assignment of errors. However, as the Respondent points out the Petitioner, in proper

person, did assert the issue of double jeopardy as defined by, Ashe. Whether the District Court of Appeal, First District, State of Florida, could have refused to consider this question is moot since they did in fact accept jurisdiction and ordered the State to respond to the Petition for Rehearing. (See Exhibit A) Nothing in the decision of the District Court even remotely suggests that they were denying the appeal on procedural grounds. Petitioner could submit voluminous arguments that the question of double jeopardy, was properly raised; however, such would be irrelevant and immaterial since the District Court did accept jurisdiction and consider the point on its merits.

The second point raised by Respondent is that the District Court could not determine whether estoppel applied since they did not have the record of the earlier trial. Petitioner would take issue with this allegation; however, again we submit that this point is moot since there is nothing in the decision of the District Court to even remotely suggest this argument. The District Court clearly pointed out that the case "seems to be on all fours with the circumstances presented in Ashe." The District Court indicated that the doctrine of collateral estoppel would apply but for the fact that the trial wherein the Petitioner was acquitted was the "second" trial and that he had been previously convicted at the "first" trial.

Respondent refers to the phrase "without further proof" and implies that the District Court was basing their decision on the absence of facts which would support a finding of collateral estoppel; however, Respondent has taken this phrase out of context. The full sentence involved is:

> "So it is then that we have a question of double collateral estoppel in that by application of this doctrine, appellant is estopped from contending without further proof that the State failed to prove the issue of his identity as one of the robbers on the occasion of the second trial inasmuch as on the first trial a jury had found above and beyond a reasonable doubt that appellant was a participant in the robbery." (Emphasis added)

Their decision is based on the "double collateral estoppel doctrine" rather than the argument suggested by Respondent.

Accepting the Respondent's position at face value, the opinion of the District Court should at least be reversed as to the doctrine of "double collateral estoppel" and remanded for further determination consistent with the Ashe decision. If the District Court finds it necessary to further review the record of the "second" trial, it can make this determination at the appropriate time.

Respectfully submitted,

LOUIS O. FROST, JR.
PUBLIC DEFENDER

GERALD SOHN
Assistant Public Defender

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to Petition for Writ of Certiorari has been forwarded to Honorable Robert L. Shevin, Attorney General for the State of Florida, The Capitol Building, Tallahassee, Florida 32304, via U.S. Mail, this 26th day of April, A.D. 1971.

GERALD SOHN
Assistant Public Defender
Duval County Courthouse
Jacksonville, Florida 32202

Counsel for Petitioner

APPENDIX A

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JULY TERM, A. D. 1970

MACIO BERNARD SIMPSON,
Appellant,
-vs-
STATE OF FLORIDA,
Appellee.

CASE NO. M-259

O R D E R

SUA SPONTE IT IS ORDERED that the State is respectfully requested to respond to the Petition for Rehearing filed in this cause in pro per within fifteen (15) days subsequent to the date of this order.

WITNESS the Honorable Dewey M. Johnson, Chief Judge, and Seal of the Court this 17th day of July, A. D. 1970.

Clerk

A True Copy

ATTEST:

Clerk, First District Court of Appeal
Tallahassee, Florida